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IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 1958

ORVAL E. FAUBUS, Governor of the State of Arkansas, GENERAL SHERMAN T. CLINGER, Adjutant General of the State of Arkansas, and LT. COL. MARION E. JOHNSON, Unit Commander of the Arkansas National Guard *Petitioners*

v.

UNITED STATES OF AMERICA (Amicus Curiae, Petitioner), and JOHN AARON, a minor, and THELMA AARON, a feme sole, et al (Plaintiffs), and WILLIAM G. COOPER, M.D., as President of Board of Trustees, Little Rock Independent School District, et al *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

THOMAS HARPER
Fort Smith, Arkansas.

RAY L. MATTHEWS
Little Rock, Arkansas

WALTER L. POPE
Little Rock, Arkansas
Attorneys for Petitioners

PARAGON PRINTING CO., LITTLE ROCK

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	4
Reasons for Granting the Writ	12
Conclusion	29
Appendix A	
Opinion Below	23a

INDEX—(Continued)

Cases Cited

	PAGE
Aaron, et al v. Cooper, et al, 143 F. Supp. 855	4,6
Aaron, et al v. Cooper, et al, 243 F. 2d 361	4
Berger, et al v. United States, 255 U.S. 22, 41 S. Ct. 230, 65 L ed 481	18,19,20
Birmingham Loan and Auction Co. v. First National Bank of Anniston, 100 Ala. 249, 13 So. 945, 946	26
Bishop v. United States, 8 Cir., 16 F. 2d 410, 411	12,15,16
Bommarito v. United States, 8 Cir. 61 F. 2d 355	12
Craven v. United States, 1 Cir., 22 F. 2d 605, cert den 276 U.S. 627; 72 L ed 739	12,18
Ebel v. Drum, 55 F. Supp. 186	24
Fierstein v. Piper Aircraft Corporation, D. C., 79 F. Supp. 217	24
General Gronze Corporation, et al v. Cupples Products Corporation, et al, 9 F.R.D. 269	23
Knapp v. Kinsey, et al, 6 Cir., 232 F. 2d 458, 466, cert den 352 U.S. 892	21
Korer v. Hoffman, 7 Cir., 212 F. 2d 217	19
Lewis v. United States, 8 Cir., 14 F. 2d 369	19
Magee v. McNany, 10 F.R.D. 5	24
Morris v. United States, 8 Cir., 26 F. 2d 444	20
Murchison in re, 349 U.S. 133, 99 L ed 942	18
Nations v. United States, 8 Cir., 14 F. 2d 507, cert den 273 U.S. 735, 71 L ed 866	19
Scott v. Beams, 10 Cir., 122 F. 2d 777	12,19
Truncale v. Universal Pictures Company, 82 F. Supp. 576	24
Tucker v. Kerner, 7 Cir., 186 F. 2d 79, 23 A.L.R. 2d 1027	19
Universal Oil Products v. Root Refining Co., 328 U.S. 575	27

Statutes

District Courts, Title 28, U.S.C.A., Section 144	3,12

Rules

Rule 12 A Federal Rules of Civil Procedure	4,14
Rule 15 (d), Federal Rules of Civil Procedure	2,3,8,9,23,24
Rule 21, Federal Rules of Civil Procedure	4,8,24

Text Books

American Jurisprudence, Volume 2, page 679	26
C.J.S., Volume 43, **Injunctions**, Section 35	22

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Petitioners, Orval E. Faubus, Governor of the State of Arkansas, General Sherman T. Clinger, Adjutant General of the State of Arkansas, and Lt. Col Marion E. Johnson, Unit Commander of the Arkansas National Guard, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on April 28, 1958.

CITATIONS OF OPINION BELOW

The Opinion of the Court of Appeals for the Eighth Circuit in the above case, is reported 254 Fed. (2), page 797.

JURISDICTION

The Judgment of the Circuit Court of Appeals for the Eighth Circuit was entered on April 28, 1958. The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1254 (1).

QUESTIONS PRESENTED

1. Was the Affidavit of Prejudice filed less than ten days after the filing of the Petition for Preliminary Injunction, and less than ten days after notice of hearing on the petition a "timely" affidavit required by Section 144 of Title 28 U.S.C.?

2. Was the Affidavit of Prejudice sufficient to show personal bias or prejudice as required by Section 144, Title 28, U.S.C.?

3. Did the United States District Court for the Eastern District of Arkansas have jurisdiction to order the Attorney General and the United States Attorney to file a petition for injunction against the petitioners herein?

4. Did the United States District Court have jurisdiction, pursuant to Rule 15 (d) and Rule 21 of the Federal Rules of Civil Procedure to make Governor Faubus and the two Arkansas National Guard officers additional parties defendant in the case of *John Aaron, et al, plaintiffs and William G. Cooper, et al, defendants?*

5. Did the petition of the United States filed as *amicus curiae* state a cause of action against Governor Faubus and the two Arkansas National Guard officers and did the United States, as *amicus curiae* have authority to seek injunctive relief?

6. Did the United States District Court for the Eastern District of Arkansas have jurisdiction to proceed

to trial on the Supplemental Complaint of the original plaintiffs in the case of *John Aaron, et al v. William G. Cooper, et al*, in which Governor Faubus and the two Arkansas National Guard officers were named as additional defendants on the day on which said Supplemental Complaint was filed and without notice to the additional defendants?

STATUTES, RULES, ETC.

Title 28, U.S.C.A. Section 144:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

Rule 15 (d), F.R.C.P.:

> "Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor."

Rule 21, F.R.C.P.:

> "*Misjoinder and Non-Joinder of Parties.* Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately."

Rule 12 (a), F.R.C.P.:

> "*Defenses and Objections—When and How Presented.* When Presented. A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, unless the court directs otherwise when service of process is made pursuant to Rule 4 (e)...."

STATEMENT

Prior to the opening of the 1956-1957 term of the Little Rock Public Schools (February 8, 1956) John Aaron and others, Negroes of school age, filed a class suit in the United States District Court against the members of the school board seeking complete and immediate integration of the races in the Little Rock Public Schools. The school board answered the complaint and submitted its plan and program for the integration of the races. See *Aaron, et al* v. *Cooper, et al,* 143 Fed. Sup. 855, affirmed 243 Fed. 2d, 361. The program of the school board was designed to start integration at the Little Rock Central High School at the opening of the school on September 3, 1957. The alleged interference with the enforcement of the decree of the District Court in said *Aaron* v. *Cooper* case was *the basis of federal jurisdiction* in the United States Distict Court.

It was alleged in the petition of the United States that on September 2, 1957, Governor Faubus called out

the Arkansas State National Guard under an order to prevent Negro students from entering any school in the city theretofore attended only by white students and to prevent white school children from entering any school theretofore attended only by Negro school children (R.7). Units of the Guard were stationed in front of the Little Rock Central High School and nine Negro school children were kept away from the entrance to the school. On September 3, 1957, the school board issued a public notice requesting Negro students not to attend the school and the board petitioned the United States District Court for a temporary stay of integration (R.1). On the same day the District Court ordered the school board to appear before it at 7:30 p.m. and show cause why the Court should not order immediate enforcement of the plan of integration approved by the Court on August 27, 1956 (R.1). At the hour and day fixed in the Court's order a hearing was held and thereafter on the same day the Court entered an order directing the school board to integrate the Little Rock Central High School "forthwith" (R.3). On the following day, September 4, 1957, United States District Judge Ronald N. Davies issued a letter-order to United States Attorney Osro Cobb requesting him "to begin at once a full, thorough and complete investigation to determine the responsibility for interference with said order" and "to report your findings to me with the least practicable delay" (R.3-4).

The United States Attorney, as ordered, began an investigation and made a report to Judge Davies. Upon receipt of this report Judge Davies made another order in which he stated that it appeared that Negro students are not being permitted to attend Little Rock Central High School in accordance with the plan of integration of the Little Rock school directors as approved by the Court. The Court then made an order directing the Attorney

General of the United States and the United States Attorney for the Eastern District of Arkansas to appear in the case of *Aaron, et al* v. *Cooper, et al* as *amici curiae* and "to file immediately a petition against Orval E. Faubus, Governor of Arkansas, Major General Sherman T. Clinger, Adjutant General, Arkansas National Guard, and Lt. Colonel Marion E. Johnson, Unit Commander, Arkansas National Guard, seeking such injunctive and other relief as may be appropriate to prevent the existing interferences with the obstructions to the carrying out of the orders heretofore entered by this court in this case". This order was made September 9, 1957 (R.5-6).

On September 10, 1957, a petition was filed in the United States District Court by the United States of America designated as *amicus curiae* against Orval E. Faubus, Governor of the State of Arkansas, and the two National Guard officers above named. The petition referred to the court order of August 28, 1956, approving the school board's plan of integration, which provided that jurisdiction was retained for the purpose of entering such further orders as might be necessary to effect the plan of integration.

Said petition alleged that Governor Faubus and the State National Guard officers had stationed troops at the Central High School under orders "to place off limits to white students those schools for colored students and to place off limits to colored students those schools heretofore operated and recently set up for white students. This order will remain in effect until the demobilization of the Guard or until further orders"; that said troops, pursuant to orders, had been and still were preventing and restraining eligible Negro students named in the petition from attending the school.

Said petition of the United States further alleged that on September 3, 1957, the Little Rock School Board was ordered to integrate forthwith and that on September 7, 1957, the Court denied an application by the school board for a stay of the order made September 3.

Said petition further alleged that the acts of Governor Faubus and the Guard officers in preventing the Negro students from attending the school obstructed the effectuation of the Court's orders of August 28, 1956, and September 3, 1957, contrary to due and proper administration of justice, and that it was necessary that Governor Faubus and the officers "be made additional parties defendant and enjoined from obstructing and interfering with the carrying out of said orders of the Court".

The petitioner prayed that the Governor and said officers be made parties defendant and that a preliminary injunction and a permanent injunction issue enjoining and restraining them, their agents, servants, employees, attorneys and all persons in active concert or participation with them, from obstructing or interfering in any way with the carrying out of the said orders of the Court (R.6-9).

Said petition of the United States was filed on September 10, 1957. On the same day, without notice to the respondents (petitioners here), the Court entered an order making them parties defendant and setting a hearing on the prayer for a preliminary injunction at 10:30 a.m., September 20, 1957. In this order the Court set forth that it appeared, "from the petition of the United States as *amicus curiae*" filed in conformity with the Court's order of September 9, 1957, that in the interest of the proper administration of justice, Governor Faubus, General Clinger and Colonel Johnson should be made additional parties defendant to prevent the continued obstruc-

tion of, and interference with the carrying out and effectuation of the orders of the Court made on August 28, 1956, and September 3, 1957. The Court stated that the order was made pursuant to Rules 15 (d) and 21 F.R.C.P. (R.9-10).

In Judge Davies' letter of September 4, 1957, to United States District Attorney Cobb he stated, "I am advised this morning that this Court's order directing the integration of the Little Rock schools . . . has not been complied with due to alleged interference with the Court's order." (R.3-4). He did not give the source of this advice. Three days later in denying the petition of the school board for a stay of integration alleged to be due to existing tension at the Central High School Judge Davies stated: "The Chief Executive of Little Rock has stated that the Little Rock Police have not had a single case of inter-racial violence reported to them and there has been no indication from sources available to him that there would be any violence in regard to this situation" (R.13). The source of this information was not revealed. The Mayor of Little Rock had not been a witness in any of the proceedings.

On September 19 Governor Faubus filed an Affidavit of Prejudice setting forth in detail the reasons why the affidavit could not have been sooner filed and the causes that disqualified Judge Davis from presiding at the trial of the issues of law and fact in the case (R.11-15).

On September 20, the day set in the Court's order of September 10 for a hearing on the petition for preliminary injunction, Governor Faubus and the officers of the State National Guard filed a motion to dismiss the petition of the United States against them, setting forth these six separate grounds for such dismissal:

1. The Court was without authority to make the order herein dated September 10, 1957.

2. The petition was illegally and improperly filed herein because it related to matters of a different nature from the subject invloved in the original action.

3. The petition was prematurely filed under Rule 15 (d) of the Rules of Civil Procedure for the United States District Courts.

4. The petitioner, the United States of America, is wholly without authority to file and maintain this action against the respondents, and the Court is wholly without jurisdiction to entertain said petition or to grant any relief thereon.

5. The petitioner, seeking a preliminary injunction and a permanent injunction, is not the real party in interest in this litigation and, for this reason, is without authority to maintain the action set forth in the petition.

6. This Court is wholly without jurisdiction of the persons of respondents and the subject matter of the petition, because

(a) The petition is in truth and in fact an attempted action against the Sovereign State of Arkansas. The State of Arkansas is actually the real respondent and party in interest and this Court has no jurisdiction of an action against the State of Arkansas:

(b) This Court is wholly without jurisdiction to question the judgment and discretion of the respondent, Orval E. Faubus, as Governor of Arkansas, and other respondents subordinate to him, in performing their duties made mandatory upon them by the Constitution and laws of the State of Arkansas (R.17-18).

Respondents also filed a motion to dismiss for failure to convene a Three Judge Court (T.19).

The United States as *amicus curiae* then filed a motion to strike the Affidavit of Prejudice (R.15-17).

The original plaintiffs, John Aaron, et al, had on the 11th day of September, 1957, filed a motion for leave to file a supplemental complaint and add additional parties. No notice of the filing of this motion was given to these petitioners (respondents below) and no response was made thereto by them or any one for them (R.10-11).

All of these motions were on September 20 immediately set for hearing, and counsel were directed to present the motions. As the motions were presented and arguments heard, the Court without delay made rulings thereon. The motion of the United States as *amicus curiae* to strike the Affidavit of Prejudice was sustained (R.16-17). The motion of the original plaintiffs for leave to file a supplemental complaint (R.21-23) was granted (R.20-21). The original plaintiffs thereupon filed a supplemental complaint. Of this action petitioners had no prior notice and announced that they could not go to trial on the supplemental complaint (R.21-23 and 36). The motion of Governor Faubus and the officers of the Guard to dismiss the petition of the United States was denied (R.18-19). The motion of Governor Faubus and the Guard officers to dismiss the petition of the United States for failure to convene a Three Judge Court was denied (R. 19-20).

Thereupon counsel for the respondents announced that they elected to stand on their motions, and they asked and obtained leave of the Court to participate no further in the proceeding and to retire from the courtroom (R. 60-61). Thereupon the Court proceeded to trial on the petitions of the United States and of the plaintiffs for preliminary injunction (R.60 and 63). The Court granted the petitions and thereupon issued a preliminary injunc-

tion (R.62-64) and made findings of fact and conclusions of law dated September 20, 1957 (R.65-74).

The findings of fact and conclusions of law were written under the style, "*John Aaron, et al, Plaintiffs* v. *William G. Cooper, et al Defendants*, Civil Action No. 3113", and the opening paragraph reads: "This cause having been heard upon the *separate applications of plaintiffs and of the United States* as *amicus curiae*, for a preliminary injunction against defendants Orval E. Faubus, Governor of the State of Arkansas, Major General Sherman T. Clinger, Adjutant General of the State of Arkansas, and Lt. Col. Marion E. Johnson, Unit Commander of the Arkansas National Guard, the Court makes the following findings of fact and conclusions of law" (R. 65) (emphasis supplied).

The first 19 numbered paragraphs of the Court's findings of fact set forth chronologically the events and the actions of the Court heretofore outlined in this statement and included almost verbatim the allegations of the petition of the United States. Paragraph 20 recited that an "injunction is necessary in order to protect and preserve the judicial process of the Court, to maintain the due and proper administration of justice, and to protect the constitutional rights of the minor plaintiffs and other eligible Negro students on whose behalf this suit is brought" (R.72).

The preliminary injunction, under the same style as the Finding of Facts and Conclusions of Law contains this opening statement: "This cause having been heard upon separate applications of the United States, as *amicus curiae*, and of the plaintiffs for a preliminary injunction, and it appearing that . . ." (R.63).

The Honorable Circuit Court of Appeals for the Eighth Circuit affirmed the actions of the United States

District Court from which this cause was appealed, and, in brief, held (1) that the Affidavit of Prejudice was not timely filed, further stating that it was "unnecessary to consider whether the Affidavit would have been sufficient to disqualify Judge Davies had it been filed in time"; (2) that the District Court had jurisdiction to issue the Preliminary Injunction, without expressly passing on the specific objections raised by these petitioners to the procedure of the Trial Court.

It is our position that the Circuit Court of Appeals so far sanctioned a departure "from the accepted and usual course of judicial proceedings" as to call for an exercise of this Court's power of supervision, and this position we shall endeavor to sustain in amplifying the six reasons relied on for the issuance of the Writ.

REASONS RELIED ON

I

This District Court held that the affidavit was not legally sufficient and was not timely filed under Sec. 144, Title 28 U.S.C.A. The affidavit was timely filed for Section 144 requires that the affidavit be ". . . timely and . . . filed not less than ten days before the beginning of the term at which the proceeding is to be heard, *or good cause shall be shown for failure to file it within such time*" (italics supplied).

The affidavit must be filed with reasonable promptness after knowledge of disqualifying facts are known by the affiant. *Bommarito* v. *United States*, 8 Cir., 61 F. 2d 355; *Scott* v. *Beams*, 10 Cir., 122 F. 2d 777. The purpose of this requirement is to protect the government from useless and costly delays and to prevent the disarrangement of the court's trial calendar. *Bishop* v. *United States*, 8 Cir., 16 F. 2d 410; *Craven* v. *United States*, 1 Cir., 22 F. 2d 605, cert den 276 U.S. 627.

The affidavit of prejudice was filed by the appellants on September 19, 1957, the day before the matter was set for hearing upon the petition of the United States for a preliminary injunction. The United States, as petitioner, in argument below, made much of the fact that there had been a delay of nine days from the time the appellants were served with notice that they had been made parties defendant until they filed the affidavit with the Court. The pertinent provision of the affidavit is as follows (R.11-12):

> "Affiant states that he did not file this affidavit ten days before the beginning of the present term of court for the reason that he had not at that time been made respondent in this case, and that he was not, in fact, made repondent herein until September 10, 1957. On that date the United States of America, by Herbert Brownell, Jr., Attorney General of the United States, pursuant to an order herein of Judge Davies directing him so to do, filed herein a petition praying that affiant and others be made respondents and for an injunction against them. This affidavit is made and filed as soon as possible after affiant and others were made respondents to this litigation, and as soon as the facts of the bias and prejudice of Judge Davies became known to him and it is not made for purposes of delay or for any other purposes than that stated herein, and further the same is filed as soon, according to affiant's information and belief, as the same could be considered by the Judge of this Court. The affidavit is accompanied by a certificate of counsel of record that said affidavit and application are made in good faith."

Quite obviously, it was impossible for petitioners to file the affidavit of prejudice within ten days before the beginning of the term of court as provided by the statute. They had not been made parties in the case at that time and, of course, had no way of knowing that they would

be parties defendant. They were made parties defendant on September 10, 1957 (and were notified thereof on that day). Between this date and the date set for hearing, summons had to be served upon them, they had to retain attorneys for proper presentation of their case, proceedings and orders of the Court had to be studied by the Attorneys, and time was necessary to investigate the facts and prepare the affidavit and brief in support thereof.

Under the order making petitioners parties, a summons were issued directing them to answer the complaint within twenty days as provided in Rule 12A of the Rules of Civil Procedure. True, the Court had set the hearing for prelimniary injunction on September 20 (R.9), but they had twenty days, or until October 1, in which to prepare and file their answer to the petition.

As pointed out to the Court at the hearing on the petition for preliminary injunction, counsel for the respondents were not engaged as such until Monday, September 16, 1957, before the hearing which had previously been by the Court set for Friday, September 20, 1957 (R.33). Counsel did not then ask for a continuance, to which surely they would have been entitled since the time for answering had not expired, but with all possible dispatch prepared the necessary affidavit and brief in support thereof, filing the same with the Clerk of the Court on Thursday, September 19, 1957. It cannot be seriously argued that counsel for appellants were not diligent in preparing and presenting the affidavit on the ninth day after the Court's order was entered and on the fourth day after they became associated with the case, and eleven days before their time for answering the petition would expire. Certainly it cannot seriously be argued that this affidavit was not ". . . made and filed as soon as possible after affiant and others were made respondents to this litigation . . ." (R.12).

Petitioners also stated in the affidavit that ". . . and further the same is filed as soon, according to affiant's information and belief, as the same could be considered by the judge of this Court . . ." (R.32). It was well known that at that time the trial judge, the Honorable Ronald N. Davies, was not in the City of Little Rock, and had not been for several days prior thereto having spent several days visiting at his home in Fargo, North Dakota. Indeed, in the argument upon the affidavit and the motion to strike, counsel for appellants pointed out to the Court that the matter was being presented to the Court at the earliest practicable moment it could be done consonant with the duties and busy routine of the Court (R.34). Also, it may be interesting to note that one of the attorneys for the original plaintiffs stated at the hearing held on Friday, September 20, 1957, that he had filed a motion for leave to file a supplemental complaint (the record reflects that the said motion was filed September 11, 1957) (R.78). ". . . Because of the fact that his Honor has been out of town, we have not been able to present this motion before today . . ." (R.35). Even if the affidavit had been filed on September 11, 1957, the Court could not have considered it before the date it was considered—that is, September 20, 1957.

In *Bishop* v. *United States*, 8 Cir., 16 F. 2d 410, 411, the Court stated:

> "It is the intent of the statute that the affidavit must be filed in time to protect the government from useless costs, and protect the court in the dissarrangement of its calendar, and prevent useless delay of trials. . . ."

Since, as shown, the Court could not have considered the affidavit prior to the time it was presented on September 20, there is absolutely no ground upon which to argue that either the Government or the other appellees

herein would have incurred useless costs, disarrangement of the Court's calendar, or useless delay of trial.

It should be noted that neither the Court nor the United States contended that they were taken by surprise at the filing of the affidavit. At the hearing on the day following the filing of the affidavit, the United States filed a motion to strike it, outlining in detail the reasons why it was alleged that the affidavit should be stricken and also filed a brief in support of the motion (R.15-16).

The cases which have upheld the trial courts in striking affidavits of prejudice on the grounds that they were not timely filed have been based on the finding that the affidavit was being used merely as an instrument of delay. In this case, the appellants filed the affidavit, not for the purpose of delay, but because meritorious reasons existed for disqualification. It should be noted that the appellants have never moved for continuance. If the appellants had been seeking a delay, certainly they would have been justified in asking for the delay on the grounds that they had not had an opportunity to prepare for the hearing, since they had only nine days to prepare for the preliminary hearing under the Court's order, and eleven additional days in which to file their answer to the petition.

As stated in *Bishop* v. *United States*, 8 Cir., 16 F. 2d 410 ". . . a defendant should not be compelled to try his case before a judge who has expressed prejudice against him . . .", nor should a technicality be permitted, on the facts reflected in this case, to support a ruling that the affidavit of bias or prejudice was not timely filed. In *Bishop* v. *United States*, 8 Cir., 16 F. 2d 410, and other cases cited, the record reflected that the disqualifying facts were known long prior to the trial date and the intent of afifants was clearly to obtain a continuance of

the trial. None of the parties to this litigation have argued, nor has the Court found, that any hardship would have been inflicted upon any party if the judge had disqualified himself. It can only be assumed that the Court, in holding that the affidavit was not timely filed, was seeking to find a technicality whereby it could strike the affidavit. This is in effect the Court saying—"even though I am prejudiced, I will hear the case because of this technicality".

II

The affidavit of prejudice filed by Governor Faubus, in the District Court is copied in full in the record (R.11). It sets forth in specific detail the times and places, where known to appellant, the occurrence of the facts and reasons giving appellant the belief that the trial judge had a personal bias against appellant. Briefly, these are that:

1. On at least four occasions made known to the appellant, the trial judge conferred privately with members of counsel for petitioner, the United States (R.12).

2. On September 7, the United States District Attorney was reported to be making interim reports daily to Judge Davies which reports had not been made public and which purportedly contained statements, information and opinions concerning the merits of this litigation prior to the time the United States became a party to the litigation (R.12).

3. On a date unknown to the appellant, the Federal Bureau of Investigation presented a report to the Court which appellant believed contained purported facts and conclusions indicating that appellant had acted without just cause and in bad faith and that on the basis of said report, the appellant in good faith believed the judge had formed a personal bias against him and prejudged the

merits of any defense he might have in the litigation (R. 13).

4. As an indication of the personal bias of the judge against appellants, in ruling on matters before the Court, he relied on and incorporated in his rulings extra judicial statements of the Chief Executive of Little Rock, who had not at that time appeared as a witness, was not under oath and no opportunity given the defendant to determine the truth or falsity of the matters stated (R.13).

5. The trial judge ordered the Attorney General on behalf of the United States to enter the case and petition for injunctive relief against the appellants based upon information and facts given him by persons not parties to the litigation and therefore departed from the role of impartial arbiter of judicial questions presented to him in a civil case and assumed the role of advocate favoring parties adverse to the appellants (R.14).

One of the fundamental rights of a litigant under our judicial system is that he is entitled to a fair trial in a fair tribunal, and that fairness requires the total absence of any actual bias or prejudice in the trial of the case. *In re Murchison*, 349 U.S. 133, 136, 99 L ed 942. When a personal, as distinguished from a judicial, bias or prejudice exists in the mind of a trial judge, the principle of fairness and impartiality is violated and any judgment rendered must be reversed. *Berger* v. *United States*, 255 U.S. 22, 65 L ed 481; *Craven* v. *United States*, 1 Cir., 22 F. 2d 605, cert den 276 U.S. 627, 72 L ed 739. In passing upon this point in the *Berger* case it was said (p. 35):

> "We are of opinion, therefore, that an affidavit upon information and belief satisfied the section, and that, upon its filing, if it show the objectionable inclination or disposition of the judge, which we have said is an essential condition, it is his duty to 'proceed no further' in the case, And in

this there is no serious detriment to the administration of justice, nor inconvenience worthy of mention; for of what concern is it to a judge to preside in a particular case? of what concern to other parties to have him so preside? and any serious delay of trial is avoided by the requirement that the affidavit must be filed not less than ten days before the commencement of the term. . . ."

Thus, the *Berger* case has settled the question as to the duties the judge before whom such an affidavit is filed may exercise in determining the sufficiency thereof. The truth of the matters stated in the affidavit must at the outset be admitted as the judge is denied the discretion of determining the truth or falsity of it. The office of the judge is to determine merely whether the reasons and facts stated in the affidavit are such that, assuming them to be true, they comply with the statute.

Upon the filing of the required statutory affidavit incorporating facts and reasons sufficient to form the belief that bias or prejudice exists in the mind of the trial judge, it is the duty of the judge to immediately disqualify himself from further participation in the case and proceed no further. *Lewis* v. *United States*, 8 Cir., 14 F. 2d 369; *Nations* v. *United States*, 8 Cir., 14 F. 2d 507, cert den 273 U.S. 735, 71 L ed 866. Moreover, it is sufficient that the allegations contained in the affidavit be predicated upon information and belief. *Berger* v. *United States*, 255 U.S. 22, 65 L ed 481; *Tucker* v. *Kerner*, 7 Cir., 186 F. 2d 79, 23 A.L.R. 2d 1027. It is well settled also that a judge whom it is sought to disqualify is presented solely with a question of law and must treat the matters alleged in the affidavit of prejudice as true. *Berger* v. *United States*, 255 U.S. 22, 65 L ed 481; *Korer* v. *Hoffman*, 7 Cir., 212 F. 2d 217; *Scott* v. *Beams*, 10 Cir., 122 F. 2d 777; and it was not within the province of the trial judge to pass upon the good faith of the affiant, the af-

fidavit being sufficient in form and accompanied by the required certificate of counsel as to good faith. *Morris v. United States*, 8 Cir., 26 F. 2d 444.

The Court has considered the predecessor of the foregoing statute which was then substantially its present form. In *Berger, et al* v. *United States*, 255 U.S. 22, 41 S. Ct. 230, 65 L ed 481, petitioners had filed with the district court an affidavit pursuant to the above statute requesting removal of the presiding judge and the assignment of another to conduct the trial. Reasons given in their affidavit were that Judge Landis had made certain derogatory statements concerning the nativity of the defendant petitioners. The question presented was whether the filing of the affidavit automatically compelled retirement of the judge from the case or whether he could properly exercise a judgment upon the facts set forth in the affidavit requesting his removal.

The holding in the *Berger* case makes it clear that the belief of a party lodging such an affidavit is of primary concern in determining the issue. It is pointed out that unless he receives information from others he would normally never know whether a bias or prejudice unfavorable to him exists in the mind of a trial judge hearing his case.

The United States, as petitioner, argued in the Court below that bias and prejudice of the trial judge was not shown merely by his having conferred about the case with the United States' Attorney or other representatives of the Department of Justice without the presence of appellants or their counsel. This argument ignores the true purpose and intent for which the statute was enacted. Governor Faubus pointed out and alleged in the affidavit as clearly as was possible the facts complained of, giving specific dates on which they were reported publicly. In *Berger* v. *United States*, at page 35 it is stated:

> "We may concede that Sec. 21 is not fulfilled by the assertion of 'rumors or gossip', but such disparagement cannot be applied to the affidavit in this case. Its statement has definite time and place and character, and the value of averments on information and belief in the procedure of the law is recognized. To refuse their application to Sec. 21 would be arbitrary and make its remedy unavailable in many, if not in most, cases. . . ."

In criminal cases, it might logically be argued that in proper circumstances the trial judge might be justified in conferring with counsel for the Justice Department in serving the ends of justice. However, this is a civil case and the role of the trial judge as impartial arbiter is more restricted. As stated by the Court in *Knapp* v. *Kinsey, et al*, 6 Cir., 232 F. 2d 458, 466, cert den 352 U.S. 892:

> "The judge should exercise self-restraint and preserve an atmosphere of impartiality. When the remarks of the judge during the course of a trial, or his manner of handling the trial, clearly indicate a hostility to one of the parties, or an unwarranted prejudgment of the merits of the case, or an alignment on the part of the Court with one of the parties for the purpose of furthering or supporting the contentions of such party, the judge indicates, whether consciously or not, a personal bias and prejudice which renders invalid any resulting judgment in favor of the party so favored."

In the *Berger* case it is said:

> ". . . the Tribunals of the country shall not only be impartial in the controversies submitted to them, but shall give assurance that they are impartial,—free, to use the words of the section, from any 'bias or prejudice' that might disturb the normal course of impartial judgment. . . ."

The affidavit alleged that the trial judge, at a time unknown to the appellants, conferred privately with the

favored litigants, the plaintifs and the United States, as petitioner, and that on a date unknown to the appellants, received a purported report from the Federal Bureau of Investigation made available to the United States' Attorney, but not to appellants; and that the report contained purported facts and conclusions of a nature to create an ill and unfriendly feeling in the mind of the judge against petitioners.

This report, as previously pointed out, was presented to and received by the trial judge at a time prior to the United States becoming a party to the litigation. It was made by persons who were not witnesses and who were never at anytime available for cross examination by the appellants, as to the truth or falsity of any matters or conclusions included therein. Certainly it cannot be said that this conduct on the part of the trial judge in conjunction with parties adverse to the appellants is not sufficient to raise a strong belief in the minds of reasonable men that a personal bias existed in the mind of the trial judge hearing the cause.

III

The petition of the United States should have been dismissed on the ground that the United States was not the real party in interest. The action was one for the protection of purely private rights. It is true that these rights arise under the Constitution of the United States, but the United States had no real interest in the action. Volume 43 C.J.S., Injunctions, Section 35:

> "In order to be entitled to an injunction complainant must be the real party in interest."

The United States cannot justify its intervention in this action on the ground that its assistance was needed to uphold the authority of the Court. If the appellants

had violated any orders of the Court there was a plain and adequate remedy by way of contempt. Presumably, the United States was of the opinion that the appellants had violated orders of the Court. Therefore, it sought and obtained a direct order against the respondents. We submit that the United States, not being a real party at interest, was not entitled to seek the relief prayed in the petition, which was for the sole benefit of the parties plaintiff in the *Aaron* v. *Cooper* case.

IV

In the Court's order dated September 9, 1957, the Court directed that pursuant to Rule 15 (d) and Rule 21, F.R.C.P., the respondents be made parties defendant in this cause. The petition recited in the first paragraph that it was being filed pursuant to and in conformity with the purpose and intent of the court's said Order (R.6-9).

Petition was not filed in compliance with or in conformity to the provisions of Rule 15 (d).

The provisions of this rule were not complied with. No party to this suit appeared before the Court and no notice was given as required by the rule.

Subdivision (d) of Rule 15 is headed "Supplemental Pleadings". The Courts have frequently had occasion to determine what pleadings are qualified to be filed thereunder. District Judge Hulen, in the case of *General Gronze Corporation, et al* v. *Cupples Products Corporation, et al*, 9 F.R.D. 269, pointed out that the plaintiffs sought permission to file a supplemental complaint under Rule 15 (d) by which infringement of a patent, granted subsequent to filing the original complaint, was charged, and that the defendants resisted the move claiming the supplemental complaint would introduce a new and independent cause of action. Since it was apparent that the

so-called supplemental complaint would introduce a new and independent cause of action, he devoted the remainder of the opinion to a discussion of the applicability of the rule.

It is too plain for argument that Rule 15 (d) is designed only to permit a party to seek permission to file a supplemental pleading. District Judge Hulen cited in further support of his ruling the case of *Fierstein* v. *Piper Aircraft Corporation*, D. C., 79 F. Supp. 217. See also *Ebel* v. *Drum*, D. C. Mass., 1944, 55 F. Supp. 186; and *Magee* v. *McNancy*, D. C. Pa., 1950, 10 F.R.D. 5.

In the court's said order of September 9, in compliance with which this petition was filed, it was stated that the order was made also pursuant to Rule 21, F.R.C.P.

It is obvious, as was stated in the case of *Truncale* v. *Universal Pictures Company*, D. C. N. Y., 1949, 82 F. Supp. 576, that this rule is intended to permit the bringing in of a person or persons who, through inadvertence, mistake or some other reason, had not been made a party and whose presence as a party was necessary or desirable to effectuate the relief prayed for in the original action.

The original action in this case was on the part of John Aaron and others, plaintiffs, seeking to enter certain schools in Little Rock, against William G. Cooper and others, school directors. It is inconceivable that a contention can be made, or will be made, that the respondents in this case were necessary parties to that action. Rule 21 could not possibly apply to them and does not afford any support for the action of the Court in ordering them to be made parties. It is true that Rule 21 provides that misjoinder of parties is not ground for dismissal of an action but here the United States was not such a party to the action as would be entitled to affirmative

relief and it could not become such a party. It is well settled that the United States can become a party litigant only where there is a Federal statute expressly authorizing it to do so, and respondents submit there is not in existence any statute authorizing the United States to become a party in an action or proceeding such as this one. Indeed the Congress has quite recently expressly refused to sanction the presence of the United States as a party litigant in cases of this particular nature.

V

The original action herein was one for the protection of private rights. Until September 10, 1957, it continued to be an action between private litigants involving purely private rights, i.e., the rights of the plaintiffs to attend a particular school of their choice.

The order of the District Court dated September 9, 1957 (R.5-6), invited the Attorney General and the United States Attorney to appear *amici curiae* and authorized them as such to submit pleadings. The order then directed them to file a petition seeking an injunction against the Governor of Arkansas and two officers of the Arkansas National Guard. Petitioners say that the Court was wholly without jurisdiction to make its order dated September 9, 1957, and, further that the Court was without jurisdiction to entertain the petition of the United States or to grant any relief thereon.

If the Attorney General and the United States Attorney were truly *amici curiae*, they had no right as such to file petitions or otherwise to seek any affirmative relief. It is axiomatic that *amici curiae* are not litigants, but are merely advisers to the Court. The fact that the Court authorized and directed the filing of the petition can add nothing to their status as *amici curiae*. If they

were truly *amici curiae*, the Court had no jurisdiction by order to give them the status of litigants.

In *Birmingham Loan & Auction Co.* v. *First National Bank of Anniston*, 100 Ala. 249, 13 So. 945, 946, the Court said:

> "An *amicus curiae*, in practice, is one who, as a stander-by, when a judge is doubtful or mistaken in a matter of law, may inform the court. Bouv. Dict. 'He is heard only by the leave and for the assistance of the court, upon a case already before it. He has no control over the suit, and no right to institute proceedings thereon, or to bring the case from one court to another by appeal or writ of error.' *Martin* v. *Tapley*, 119 Mass. 116; 1 Lawson, Rights, Rem & Pr. p. 262, Sec. 156."

In American Jurisprudence, Volume 2, page 679, the following appears:

> ". . . an *amicus curiae* is heard only by leave and for the assistance of the court upon a case already before it. He has no control over the suit and no right to institute any proceedings therein. It seems clear that an *amicus curiae* cannot assume the function of a party in an action or proceeding pending before the court, and that, ordinarily, he cannot file a pleading in a cause. An *amicus curiae* is restricted to suggestions relative to matters apparent on the record or to matters of practice. His principal function is to aid the court on questions of law."

On page 682 the following appears:

> "An *amicus curiae* has no right to except to the rulings of the court; and if he takes such exceptions, they cannot avail on appeal. He has no right to complain if the court refuses to accept his suggestions, for it is not the function of an *amicus curiae* to take upon himself the management

of a cause and assume the functions of an attorney-at law."

The petition filed by the United States was filed by the United States solely as *amicus curiae*. It is clear that the United States, as *amicus curiae* had no right to ask for the joinder of additional parties and the entry of an injunction against such parties, for, in so doing, the United States became a litigant and not a "friend of the Court". It is apparent from the order dated September 9, 1957, and from the petition filed by the United States that it was the intent of the Court and of the United States that the United States become an actual litigant in this controversy under the guise of *amicus curiae*. The United States had no right to intervene in this action as a litigant, and the Court had no jurisdiction to order its intervention. The Court had no jurisdiction to entertain a petition by the United States seeking to aid private litigants in the enforcement of private rights.

If the United States had no right to intervene, and if the Court had no jurisdiction to consider the intervention, the Court's order of September 9, did not create jurisdiction to consider the petition, whether the United States was considered a litigant or whether it was considered a friend of the Court.

The District Courts of the United States have only such jurisdiction as is expressly conferred on them by the Congress. The Congress has expressly refused to confer jurisdiction on such courts to entertain petitions for injunction by the United States in Civil Rights actions.

The case of *Universal Oil Products* v. *Root Refining Company*, 328 U.S. 575, is cited by the Circuit Court of Appeals to support the action brought by the *amici curiae*. In that case attorneys for one or more of the parties were requested to serve in the role of *amici curiae* in an

investigation to ascertain whether fraud had been practiced on the Court. They undertook this service and procured the appointment of a Master, whose report that fraud had been practiced resulted in the vacation of the judgment that had been rendered in the case. It is seen that there is no similarity in the part taken by *amici curiae* in the *Root Refining* case and that taken by counsel in this one. There *amici curiae* were acting in an ancillary capacity as investigators of questionable features surrounding the conduct of a Judge. Here, *amici curiae* were acting in the capacity of leading counsel in an effort to secure substantial rights for the parties themselves. There are no other interests involved than the rights of the parties to the suit. This Court condemned such action by saying, in the *Root* case, "*Amici* selected by the Court to vindicate its honor ordinarily ought not to be in the service of those having private interests in the outcome". While *amici* in this case were not employed by the parties in the case, they were serving the parties who had already employed their own counsel and were ably represented in this, as well as other phases of the litigation.

VI

This question practically answers itself in the negative. No notice was given petitioners of the filing of the motion to permit the original plaintiffs to file a supplemental complaint. Yet, on September 20, 1957, they were permitted to file it, and the District Court immediately proceeded to trial on the supplemental complaint and the petition of the United States.

We have endeavored to show that the Court was without jurisdiction to proceed to trial on the petition of the United States against the petitioners. This lack of jurisdiction stems from the incapacity of the petitioner in its role of *amicus curiae* and its non-interest in the

subject manner of the civil litigation. Nevertheless, the Court proceeded to trial on the Supplemental Complaint and granted effective relief to the original plaintiffs and against the petitioners in the absence of notice of the filing of the Supplemental Complaint or of the motion for leave to file it.

CONCLUSION

Regardless of the heights of emotion and public interest or curiosity attained by this suit, and regardless of the notoriety given the participants, there can surely be no justification for disregarding statutes and rules of procedure, the observance of which, we feel, would have gone a long way towards ameliorating the great damage to racial relations that has resulted from the precipitate outcome of the case.

Petitioners respectfully ask this Court to grant the Writ of Certiorari as prayed in the petition.

THOMAS HARPER
Fort Smith, Arkansas

KAY L. MATTHEWS
Little Rock, Arkansas

WALTER L. POPE
Little Rock, Arkansas

Attorneys for Petitioners

Appendix A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15,904

Orval E. Faubus, Governor of the State of Arkansas, General Sherman T. Clinger, Adjutant General of the State of Arkansas, and Lt. Col. Marion E. Johnson, Unit Commander of the Arkansas National Guard, (Respondents) *Appellants*

v.

United States of America (Amicus Curiae, Petitioner), and John Aaron, a minor, and Thelma Aaron, a minor, by their mother and next friend, (Mrs.) Thelma Aaron, a feme sole, et al (Plaintiffs), and William G. Cooper, M.D., as President of Board of Trustees, Little Rock Independent School District, et al (Defendants) *Appellees*

Appeal from the United States District Court for the Eastern District of Arkansas.

[April 28, 1958]

Kay L. Matthews and Thomas Harper (Walter L. Pope was with them on the brief) for Appellants.

Donald B. MacGuineas, Attorney, Department of Justice. (George Cochran Doub, Assistant Attorney General, Osro Cobb, United States Attorney, and Samuel D. Slade, Attorney, Department of Justice, were with him on the brief) for Appellee United States of America, Amicus Curiae.

Thurgood Marshall (Wiley A. Branton was with him on the brief) for Appellees John Aaron, et al.

Hansel Proffitt filed Brief Amicus Curiae.

Before SANBORN, WOODROUGH and JOHNSON, Circuit Judges.

SANBORN, Circuit Judge.

This is an appeal from an order of the District Court made September 20, 1957 (filed September 21, 1957), in the action of *John Aaron, et al, Plaintiffs* v. *William G. Cooper, et al, Defendants* (143 F. Supp. 855), to which the appellants on September 10, 1957, had been made additional parties defendant. The order enjoined the appellants, and others under their control or in privity with them, from using the Arkansas National Guard to prevent eligible Negro children from attending the Little Rock Central High School, and otherwise obstructing or interfering with the constitutional right of such children to attend the school. The order expressly preserved to Governor Faubus the right to use the Arkansas National Guard for the preservation of law and order by means which did not hinder or interfere with the constitutional rights of the eligible Negro students.

The appellants assert that the order appealed from must be reversed because the District Judge erred in rejecting an affidavit of prejudice and in refusing to disqualify himself. They assert also that the Court erred: (1) in overruling the motion of the appellants to dismiss the petition of the United States asking that the appellants be made additional defendants in the *Aaron* case and be enjoined from using the Arkansas National Guard to prevent eligible Negro students from attending the Little Rock Central High School; (2) in overruling appellants' motion to dismiss the petition for failure to convene a three-judge court; and (3) in entering the preliminary injunction.

A statement of the events and proceedings which constitute the background of this controversy seems necessary to a full understanding of the questions presented and to show how they arose.

The Supreme Court of the United States on May 27, 1954, decided in *Brown* v. *Board of Education of Topeka*, 347 U.S. 483, that segregation of white and Negro children in the public schools of a State solely on the basis of race, under state laws permitting or requiring such segregation, denied to Negro children the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States, even though the physical facilities and other tangible factors of white and Negro schools were equal. The case was restored to the Supreme Court's docket to await the formulation of decrees and for further argument on questions not then decided.

On May 31, 1955, in 349 U.S. 294, the Supreme Court announced its supplemental opinion and final judgments in the *Brown* case. We quote some of the pertinent excerpts from the opinion (pages 288, 299, 300):

"These cases were decided on May 17, 1954. The opinions of that date, declaring the fundamental principle that racial discrimination in public education is unconstitutional, are incorporated herein by reference. All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle. * * *

* * * * * * *

"Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. * * *

"* * * At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

"While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date."

On May 23, 1955, the School Board of the Little Rock School District had adopted and published a statement to the effect that it was the Board's "responsibility to comply with Federal Constitutional Requirements" and that it "intended to do so when the Supreme Court of the United States outlines the method to be followed," and that in the meantime the Board would make the needed studies "for the implementation of a sound school program on an integrated basis." Pages 858-859 of 143 F. Supp.

The Superintendent of the Little Rock schools, upon instructions from the School Board, prepared a plan for the gradual integration over a period of about seven years of the public school in Little Rock, commencing at the senior high school level in the fall of 1957. The plan was adopted by the Board on May 24, 1955, and is fully set forth in the opinion of the District Court in *Aaron* v. *Cooper, supra,* 143 F. Supp., at pages 859-860, and need not be restated in this opinion.

On February 8, 1956, John Aaron and other minor Negroes of school age brought a class action in the United States District Court for the Eastern District of Arkansas against the members of the Little Rock School Board, for the purpose of bringing about the immediate integration of the races in the public schools of Little Rock. The School Board answered the complaint and submitted to the court its plan for integration which it asserted would best serve the interests of both races (page 858 of 143 F. Supp.). It alleged that a hasty integration would be unwise and would retard the accomplishment of the integration of the Little Rock schools. United States District Judge John E. Miller, who heard the case, filed a comprehensive opinion on August 27, 1956 (143 F. Supp. 855), in which it was determined that the defendants, the school authorities, had acted in the utmost good faith and with

the sole objective "to faithfully and effectively inaugurate a school system in accordance with the law as declared by the Supreme Court." The District Court ordered that the plan of the defendants be approved as adequate; denied the plaintiffs any declaratory or injunctive relief; and retained jurisdiction of the case for the entry of such other and further orders as might be necessary for the effectuation of the approved plan. (Page 866 of 143 F. Supp.)

The plaintiffs appealed. They urged in this Court, as they had in the District Court, that there were no valid reasons why integration in the public schools of Little Rock should not be completely accomplished by September, 1957. On appeal this Court held, on April 26, 1957, that "in the light of existing circumstances the plan set forth by the Little Rock School Board and approved by the District Court is in present compliance with the law." *Aaron* v. *Cooper*, 8 Cir., 243 F. 2d 361, 364. The judgment of the District Court was affirmed, with its retention of continued jurisdiction.

On September 2, 1957, the appellants, Orval E. Faubus, Governor of the State of Arkansas, and Sherman T. Clinger, Adjutant General of the State, stationed units of the Arkansas National Guard, under the command of Lt. Col. Marion E. Johnson, at the Little Rock Central High School. The order of Governor Faubus to General Clinger was as follows:

> "You are directed to place off limits to white students those schools for colored students and to place off limits to colored students those schools heretofore operated and recently set up for white students. This order will remain in effect until the demobilization of the Guard or until further orders."

As a result of this order, nine Negro school children who, under the School Board's approved plan of integration, had been found eligible to attend the high school, were not, by request of the school authorities, in attendance on September 3, 1957, the opening day of the fall term.

The court, by United States District Judge Ronald N. Davies, sitting by assignment, on September 3, 1957, issued an order directing the members of the School Board and the Superintendent of the Little Rock Public Schools, the defendants in *Aaron* v. *Cooper*, to show cause why the court, under its reservation of jurisdiction in that case, should not order them to put into effect forthwith the plan of integration approved by the District Court and by the United States Court of Appeals. On the same day, after a hearing on the order to show cause, the court found that, because of the stationing of military guards at the Central High School by state authorities, the defendants (members of the School Board) had reversed the position taken by them in their plan for integration and had requested the eligible Negro students to stay away from the school "until the legal dilemma was solved." The court also found that the evidence presented disclosed no reason why the plan of integration approved by the court could not be carried out forthwith. The defendants (members of the School Board and the Superintendent of Schools) were ordered to carry out the plan.

Judge Davies on September 4, 1957, wrote the following letter to the United States Attorney for the Eastern District of Arkansas:

"Mr. Osro Cobb
United States Attorney
Little Rock, Arkansas

"My dear Mr. Cobb:

"I am advised this morning that this Court's order directing the integration of the Little Rock schools under a plan submitted by the Little Rock School Board, which plan has been approved by a Judge of this court and by the United States Court of Appeals for the Eighth Circuit, has not been complied with due to alleged interference with the Court's order.

"You are requested to begin at once a full, thorough and complete investigation to determine the responsibility for interference with said order, or responsibility for failure of compliance with said order of this Court heretofore made and filed, and to report your findings to me with the least practicable delay.

Very truly yours,

RONALD N. DAVIES
United States District Judge
(Sitting by Assignment)

On September 7, the court denied a "petition of the Little Rock School District directors and of the Superintendent of the Little Rock Public Schools for an order temporarily suspending enforcement of its plan of integration heretofore approved by this Court."

On September 9, the court entered the following order:

"In The United States District Court
For The Eastern District Of Arkansas
Western Division

"John Aaron, et al, Plaintiffs,

v. No. 3113 Civil.

"William G. Cooper, et al, Defendants.

"On the date hereof, the Court having received a report from the United States Attorneys for the Eastern District of Arkansas, made pursuant to the Court's request, from which it appears that negro students are not being permitted to attend Little Rock Central High School in accordance with the plan of integration of the Little Rock School Directors approved by this Court and by the Court of Appeals for the Eighth Circuit.

"And the Court being of the opinion that the public interest in the administration of justice should be represented in these proceedings and that it will be of assistance to the Court to have the benefit of the views of counsel for the United States as amici curiae, and this Court being entitled at any time to call upon the law officers of the United States to serve in that capacity, now, therefore,

"It is ordered that the Attorney General of the United States or his designate, and the United States Attorney for the Eastern District of Arkansas or his designate, are hereby requested and authorized to appear in these proceedings as amici curiae, and to accord the Court the benefit of their views and recommendations with the right to submit to the Court pleadings, evidence, arguments and briefs, and for the further purpose, under the direction of this Court, to initiate such further proceedings as may be appropriate.

"It is further ordered that the Attorney General of the United States and the United States Attorney for the Eastern District of Arkansas be

and they are hereby directed to file immediately a petition against Orval E. Faubus, Governor of the State of Arkansas; Major General Sherman T. Clinger; Adjutant General, Arkansas National Guard; and Lt. Colonel Marion E. Johnson, Unit Commander, Arkansas National Guard, seeking such injunctive and other relief as may be appropriate to prevent the existing interferences with and obstructions to the carrying out of the orders heretofore entered by this court in this case.

"Dated at Little Rock, Arkansas, this 9th day of September, 1957.

RONALD N. DAVIES
United States District Judge
(Sitting by Assignment)"

On September 10, the United States, by its Attorney General and the United States Attorney for the Eastern District of Arkansas, filed a petition pursuant to the court's order, stating that units of the Arkansas National Guard were still forcibly preventing and restraining Negro students, eligible under the approved plan of school integration, from entering school and attending classes; that the acts of the appellants, through the use of the Arkansas National Guard, were obstructing and interfering with the effectuation of the court's orders of August 28, 1956, and September 3, 1957, "contrary to the due and proper administration of justice." The United States asked that the appellants be made additional parties defendant in the *Aaron* case and be enjoined, together with those under their control or in privity with them, from using the National Guard to prevent the eligible Negro students from attending the Little Rock High School, and otherwise obstructing or interfering with the effectuation of the court's orders in that regard.

The court on September 10, 1957, added the appellants as defendants in the *Aaron* case, and set the Government's

petition for a preliminary injunction for hearing on September 20, 1957.

On September 19, 1957, the day before the hearing, Governor Faubus filed an affidavit of prejudice against Judge Davies, stating that he was informed and believed Judge Davies had a personal prejudice against him and a personal bias in favor of the plaintiffs John Aaron et al. and the United States. The reasons for the Governor's belief were stated at length in this affidavit.

The United States on September 20, 1957, the day of the hearing, moved the court to strike the affidavit of prejudice as untimely and legally insufficient.

The appellants, at the hearing on September 20, 1957, moved for a dismissal of the petition of the United States on the grounds that the court was without authority to make the order of September 10 bringing the Government, the Attorney General, and the United States Attorney into the case; that the petition was illegally and prematurely filed by the Government; that the Government and its law officers were without standing to maintain the action against the appellants; that the court was without jurisdiction to entertain the action; that the action was in fact against the State of Arkansas; and that the court was without power to question the judgment and discretion of Orval E. Faubus, as Governor of Arkansas, in his use of the Arkansas National Guard.

The plaintiffs John Aaron, et al, at the hearing on September 20, 1957, were granted leave to file, and did file, a supplemental complaint against the appellants as additional defendants, in which the plaintiffs prayed for a preliminary injunction to prohibit the appellants from using the Arkansas National Guard to prevent the orders of the court requiring effectuation of the approved plan

of integration from being carried out. The only objection to the filing of the plaintiffs' supplemental complaint and its consolidation with the petition of the Government was made by the appellants upon the ground that "these plaintiffs have passed out of this action by the Court's order of August 15, 1956, in denying their prayer for relief."

At the hearing the court granted the motion of the Government to strike the affidavit of prejudice on the grounds that it was untimely filed and was legally insufficient. The court then denied the several motions of the appellants to dismiss the petition of the Government.

At the conclusion of the hearing on September 20, 1957, the court made the following statement:

> "It is very clear to this Court from the evidence and the testimony adduced upon the hearing today that the plan of integration adopted by the Little Rock School Board and approved by this Court and the Court of Appeals for the Eighth Circuit has been thwarted by the Governor of Arkansas by the use of *National Guard* troops.
>
> "It is equally demonstrable from the testimony here today that there would have been no violence in carrying out the plan of integration and that there has been no violence.
>
> "The petition of the United States of America as amicus curiae for a preliminary injunction against Governor Faubus, General Clinger and Colonel Johnson, and all others named in the petition is granted; and such injunction shall issue without delay, enjoining those respondents from obstructing or preventing, by use of the National Guard or otherwise, the attendance of Negro students at Little Rock Central High School under the plan of integration approved by this Court and from other-

wise obstructing or interfering with orders of this Court in connection with the plan of integration.

"Findings of fact, conclusions of law and order, and related instruments will be prepared by the attorneys for the United States."

The order granting the preliminary injunction, from which this appeal has been taken, was made on September 20, 1957, and filed on September 21, 1957, together with supporting findings of fact and conclusions of law, the sufficiency of which are not challenged.

The first question for decision is whether the affidavit of prejudice filed by Governor Faubus against Judge Davies the day before the petition of the Government and the supplemental complaint of the plaintiffs seeking a preliminary injunction were heard, was timely and sufficient.

Section 144 of Title 28 U.S.C., so far as pertinent, provides:

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time." * * *"

No facts are stated in the affidavit of prejudice which, in our opinion, justified the Governor in waiting until the day before the hearing to file it. He stated in his affidavit that he did not file it ten days "before the be-

ginning of the present term of court for the reason that he had not at that time been made respondent in this case, and that he was not, in fact, made a respondent herein until September 10, 1957." He also stated that he filed it as soon "as the facts of the bias and prejudice of Judge Davies became known to him." The reasons given by the Governor for his belief that Judge Davies had a personal prejudice against him and a bias in favor of his adversaries are all based on events, occurrences and proceedings which took place and were well known before September 10, 1957.

There was, in our opinion, undue delay in the filing of the affidavit of prejudice. See and compare, *Bishop* v. *United States*, 8 Cir., 16 F. 2d 410, 411-412; *Rossi* v. *United States*, 8 Cir., 16 F. 2d 712, 716; *Bommarito* v. *United States*, 8 Cir., 61 F. 2d 355. The situation called for the utmost promptness if Judge Davies was to be disqualified and another judge assigned to take his place. Apparently no other federal district judge then in either District in Arkansas was available. We find it unnecessary to consider whether the affidavit would have been sufficient to disqualify Judge Davies had it been filed in time.

The second question for decision is whether the District Court had jurisdiction to make its order of September 9, 1957, inviting the Attorney General and the United States Attorney to appear as amici curiae, and authorizing them to submit pleadings, evidence, arguments and briefs, and to file a petition for injunctive relief to prevent obstructions to the carrying out of the court's orders. The appellants contend that the court was without authority to make the order, and that the Attorney General and the United States Attorney as amici curiae were without authority to file a petition for injunctive relief.

The District Court in the *Aaron* case, as has already been stated, reserved, in its judgment and decree, jurisdiction "for the entry of such other and further orders as may be necessary to obtain the effectuation of the plan [of gradual school integration]" as contemplated and set forth in its opinion. When the court was informed that the effectuation of the plan which it had approved and ordered into effect was being prevented by the appellants' use of the National Guard, action was called for to vindicate the court's judgment and orders.

It was proper for the court to do all that reasonably and lawfully could be done to protect and effectuate its orders and judgments and to prevent them from being thwarted by force or otherwise. The court could not, with propriety, employ private counsel to do the necessary investigative and legal work. It has, we think, always in the past been customary for a federal District Court to call upon the law officers of the United States for aid and advice, in comparable situations.

As the Supreme Court said in *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U.S. 575, 581, "After all, a federal court can always call on law officers of the United States to serve as *amici* * * *. *Amici* selected by the court to vindicate its honor ordinarly ought not to be in the service of those having private interests in the outcome."

In our opinion, the status of the Attorney General and the United States Attorney was something more than that of mere amici curiae in private litigation. They were acting under the authority and direction of the court to take such action as was necessary to prevent its orders and judgments from being frustrated and to represent the public interest in the due administration of justice.

It seems to us unnecessary to labor the point, since the plaintiffs in the *Aaron* case were, at the time of the hear-

ing on September 20, 1957, still real parties in interest and they joined the Government in praying for the preliminary injunction which was granted and which we do not doubt the court had power to grant. We are satisfied that the District Court did not abuse its discretion in granting the preliminary injunction. See *Sherman* v. *Missouri Pacific Railroad Co.*, 8 Cir., 250 F. 2d 191, 195.

Whether the District Court should have dismissed the petitions of the United States and the plaintiffs for injunctive relief, for failure to convene a three-judge District Court under 28 U.S.C. § 2281, is the next question for review.

That section, which is headed "Injunction against enforcement of State statute; three-judge court required"—provides:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

Neither the petition of the United States nor the supplemental complaint of the plaintiffs challenge the validity of any provisions of the Constitution or laws of Arkansas conferring executive and military powers on the Governor. The only claim made was that the Governor was using military force in violation of law and of the plaintiffs' rights under the Constitution of the United States and the orders of the court. No claim was made that he could

not use the Arkansas National Guard to preserve law and order. His right to do so was expressly recognized by the District Court. The appellees' contention is, in effect, that he could not use State troops, ostensibly to preserve order, in violation of law.

In a comparable situation, the Supreme Court in *Phillips* v. *United States*, 312 U.S. 246, 252-253, held 28 U.S.C. § 2281 inapplicable. In that case the Court said:

> "* * * But an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority even though a misreading of the statute is invoked as justification. At least not within the Congressional scheme of § 266 [now 28 U.S.C. § 2281]. It is significant that the United States in its complaint did not charge the enabling acts of Oklahoma with unconstitutionality, but assailed merely the Governor's action as exceeding the bounds of law. In other words, it seeks a restraint not of a statute but of an executive action. But the enforcement of a 'statute', within the meaning of § 266, is not sought to be enjoined merely because a state official seeks shelter under it by way of defense against a charge of lawlessness. * * *
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> "* * * No one questions Oklahoma's authority to give her Governor 'Supreme Executive power' nor to make him Commander-in-Chief of her militia. What is here challenged is a single, unique exercise of these prerogatives of his office. * * *"

The Supreme Court distinguished *Sterling* v. *Constantin*, 287 U.S. 378, which had been decided by a three-judge District Court. It said of that case (page 253 of 312 U.S.):

> "*Sterling* v. *Constantin*, 287 U.S. 378, which is invoked as a precedent, was a very different case. There martial law was employed in support of an order of the Texas Railroad Commission limiting production of oil in the East Texas field. The

> Governor was sought to be restrained as part of the main objective to enjoin the execution of an order made by an administrative * * * commission,' and as such was indubitably within § 266. * * *."

While we are of the opinion that it would not have been improper, and would probably have been wise, for the District Judge to have convened a three-judge District Court to hear the petitions for a preliminary injunction, we think, in view of *Phillips* v. *United States*, *supra*, 312 U.S. 246, he was not compelled to do so. Had he convened such a court, its order, like that of a single district judge, would have been appealable to the United States Court of Appeals, and not directly to the Supreme Court of the United States. *Phillips* v. *United States*, *supra*, page 254 of 312 U.S. The appellants' contention that they were entitled to a dismissal because of the District Court's failure to convene a three-judge court is overruled on the authority of the *Phillips* case.

We think there is no merit in the appellants' argument that the discretion of the Governor in using the National Guard in derogation of the judgment and orders of the federal District Court and in violation of the constitutional rights of the eligible Negro students could not be questioned. In *Sterling* v. *Constantin*, 287 U.S. 378, at page 397, the Supreme Court said of an analogous contention:

> "If this extreme position could be deemed to be well taken, it is manifest that the fiat of the state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the State may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a con-

clusion is obviously untenable. There is no such avenue of escape from the paramount authority of the Federal Constitution. When there is a substantial showing that the exertion of state power has overriden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression. * * *"

In that case the Court also said (page 393 of 287 U.S.):

"The District Court had jurisdiction. The suit is not against the State. The applicable principle is that where state officials, purporting to act under state authority, invade rights secured by the Federal Constitution, they are subject to the process of the federal courts in order that the persons injured may have appropriate relief. * * * The Governor of the State, in this respect, is in no different position from that of other state officials. * * *"

See also and compare, *Powers Mercantile Co.* v. *Olson*, D. C. Minn., 7 F. Supp. 865, 868, and *Strutwear Knitting Co.* v. *Olson*, D. C. Minn., 13 F. Supp. 384. What was said, more than twenty years ago, in the case last cited, in which a United States District Court for the District of Minnesota, composed of three judges, in 1936, enjoined the Governor of Minnesota, the Adjutant General of the State, and the Mayor of Minneapolis, from using the Minnesota National Guard, under the guise of preserving law and order, to deprive the Strutwear Company of the use of its plant because of a strike, may, we think, with propriety be repeated here (page 391 of 13 F. Supp.):

"That surrender to the demands of a public enemy in time of war or accession to the demands of insurrectionists or rioters, at other times, is one way of restoring peace and quelling disorder, no one will deny. It has a direct, even though a dishonorable, relation to the maintenance of order, but

no relation at all to the preservation of law. It results in the restoration of peace and order at the sacrifice of law. As the plaintiff has aptly pointed out in this case, it does not require troops or police to assist it in surrendering its constitutional rights to possess and use its plant. It can do that for itself.

"It is certain that while the state government is functioning, it cannot suppress disorders the object of which is to deprive citizens of their lawful rights, by using its forces to assist in carrying out the unlawful purposes of those who create the disorders, or by suppressing rights which it is the duty of the state to defend. The use of troops or police for such purposes would breed violence. It would constitute an assurance to those who resort to violence to attain their ends that, if they gathered in sufficient numbers to constitute a menace to life, the forces of law would not only not oppose them, but would actually assist them in accomplishing their objective. There could be but one final result, namely, a complete breakdown of government and a resort to force both by the law-abiding and the lawless. A rule which would permit an official, whose duty it was to enforce the law, to disregard the very law which it was his duty to enforce, in order to pacify a mob or suppress an insurrection, would deprive all citizens of any security in the enjoyment of their lives, liberty, or property. The churches, the stores, the newspapers, and the channels of communication and of trade and commerce, and the homes of the people themselves, could be closed by the civil authorities under such a rule, in case the owners had in some way offended a sufficiently large group of persons willing to resort to violence in order to close them. Carried to its logical conclusion, the rule would result in the civil authorities suppressing lawlessness by compelling the surrender of the intended victims of lawlessness. The banks could be closed and emptied of their cash to prevent bank robberies; the post office locked to

prevent the mails being robbed; the citizens kept off the streets to prevent holdups; and a person accused of murder could be properly surrendered to the mob which threatened to attack the jail in which he was confined."

Our conclusion is that nothing advanced by the appellants in the insant case would justify the reversal by this Court of the order appealed from.

The order is affirmed.

A true copy.

Attest:

ROBERT C. TUCKER

Clerk, U. S. Court of Appeals, Eighth Circuit.